Opinions of President Lincoln and His Cabinet on Statehood for Western Virginia 1862-1863

By Isaiah A. Woodward*

After the election of Abraham Lincoln in 1860, it was not long before South Carolina and six other Southern States—Georgia, Mississippi, Alabama, Louisiana, Florida, and Texas—separated from the Federal Union.

Influenced in part by the action of the Southern States, Governor John Letcher of Virginia called the General Assembly in extra session on January 7, 1861, at the State Capitol in Richmond. In this city on April 17, 1861, the General Assembly passed an ordinance to repeal the ratification of the Constitution of the United States of America. The majority of delegates from the western section of Virginia attending the Secession Convention at Richmond in 1861, voted against the ordinance because of their loyalty to the Union. Eastern Virginia formed an alliance with Jefferson Davis and the so-called "Confederate States of America." This overt act divided the State of Virginia into armed camps with the Rebels dominating in the east and the Unionists dominating in the northwestern section of the State.[1]

Mass meetings were held in the northwestern section of Virginia by the Unionists in order to persuade the citizens to vote against the Ordinance of Secession. One of the earliest Union meetings was held at Morgantown, Virginia. Following the Clarksburg meetings of April 22, 1861, two conventions be-

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Author's Note:

*The purpose of this study is to provide students and teachers of American History with important documentary materials on the Statehood of West Virginia. Included in it are the complete original letters of President Abraham Lincoln and members of his cabinet concerning the constitutionality and expediency of the "Act for the admission" of West Virginia to Statehood in the Federal Union. Here, for the first time, the full texts of these letters have been printed.

The writer is greatly indebted to Dr. Percy Powell, Superintendent of the Manuscripts Division, Library of Congress, Washington, D. C., for materials drawn from The Robert Todd Lincoln Collection of the Papers of Abraham Lincoln; and to my colleagues at Morgan State College, Baltimore, Maryland, for their suggestions.

I am also happy to acknowledge my indebtedness to Dr. Festus P. Summers, a scholar of West Virginia History and Head of the Department of History, West Virginia University, for reading the materials and making suggestions.

[1] Charles H. Ambler and Festus P. Summers, West Virginia the Mountain State (New Jersey, 1958), pp. 100, 103-104, passim.

tween 1861 and 1862 were called by the Unionists in the city of Wheeling, Virginia. During the course of these conventions several ordinances were passed. The ordinance of June 18, 1861, as promulgated and passed by the Second Wheeling Convention, provided for the reorganization of the State Government. On June 20, 1861, the "Reorganized" State came into existence with Francis H. Pierpont as its governor. It was from the "Reorganized" State of Virginia that western Virginia secured consent to form a new State. On May 29, 1862, Senator Waitman T. Willey presented a "Memorial" in the Senate of the United States requesting statehood for West Virginia. The West Virginia Statehood Bill was passed by both the House of Representatives and the Senate. Congress requested, however, an amendment to the proposed constitution of West Virginia providing for gradual emancipation of all slaves.[3]

After the bill had passed both Houses of Congress, it was sent to President Lincoln for his signature. Meanwhile, Lincoln received numerous telegrams and letters from sympathizers with the act. One Mr. Archibald Campbell, a Unionist leader and editor of the Wheeling *Daily Intelligencer*, urged President Lincoln to approve the bill, as a veto would affect the "Union Sentiment" throughout the western counties. In his letter to the Chief Executive, Campbell expressed in a sincere manner, the feelings of the West Virginians:

> I wish simply to call your attention to the present feeling and the future danger connected with a veto of the bill that has passed Congress. No people were ever more united in a wish than are our people for a new state. South Carolina in my opinion was never as much united for Secession.[4]

Perhaps this kind of opinion or judgment influenced the President to support the new State movement. At any rate, Lincoln did sign the bill on December 31, 1862, because he was cognizant of its constitutionality.[5] Prior to signing the bill, Lincoln with the advice of Mr. Bates, the Attorney General of the United States, requested each of his cabinet members to

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[3] Isaiah A. Woodward, *West Virginia and Its Struggle for Statehood, 1861-1863* (Baltimore, 1954), p. 26.

[4] MS, Lincoln Papers, No. 20635, Campbell to Lincoln, Washington, D. C., December 31, 1862. Hereafter cited as MS, L.P. The Robert Todd Lincoln Collection of the Papers of Abraham Lincoln consists of 194 volumes of manuscripts covering a period in the history of the U. S. from 1809 to 1865. This collection, which is in the Manuscript Division of the Library of Congress, Washington, D. C., was opened to the public in 1947.

[5] MS, L.P., Nos. 20625-20628, Lincoln's Views on West Virginia Statehood, Washington, D. C., March 2, 1865.

put in writing his opinion on the legality of the Statehood Bill, and to state whether or not it was expedient.[5] Individual members of the cabinet read and discussed their official reports before Lincoln and their associates.[6] This resulted in two schools of thought developing within the cabinet over the constitutionality and expediency of the act. The propositions were answered in the affirmative by Edwin M. Stanton, Secretary of War; Salmon P. Chase, Secretary of the Treasury and William H. Seward, Secretary of State. On the other hand Montgomery Blair, Postmaster General; Gideon Welles, Secretary of the Navy and Edward Bates, Attorney General gave negative answers.[7] The affirmative and negative views of the cabinet, according to recorded evidence are, in part, as follows:

Mr. Stanton in a letter to Lincoln, dated December 26, 1862, commented favorably on the admission of West Virginia to the Union. His justification was that he had been "unable to perceive any point on which the Act of Congress conflicts with the constitution." Moreover, the formation of a new State would affect the geographical boundary between the slave and the free States. "The advantage of this upon every point of consideration," according to the Secretary of War, "surpasses all objections which have occurred to me on the question of expediency."[8] Secretary Chase, in answering both questions in the affirmative, was of the belief that a veto of the act by Lincoln "would result in the profound discouragement of all loyal men."[9] Seward firmly believed that the State of West Virginia had been formed "within the jurisdiction" of the Old Dominion; thus the act for admission was constitutional.[10] Mr. Blair, the only Marylander in Lincoln's first cabinet and a member of the opposition group, was sincere in his objections to the dismemberment of Virginia because he felt that a veto of the act was "to the Westerners' best interest"; moreover, he continued, they "will soon see in such refusal a thoughtfulness

[5] MS, L.P., No. 20387, Lincoln to His Cabinet, Washington, D. C., December 23, 1862.

[6] The reading of the official opinions on the act took place in a Cabinet Meeting called by the President on December 26, 1862, at the White House. Cf. John T. Morse, ed., *Diary of Gideon Welles* (Boston: Mifflin Company, 1911), pp. 206 f.

[7] G. B. Smith, Secretary of the Interior, resigned his position in order to become a judge in Indiana. Cf. Annual Report of the American Historical Association, *The Diary of Edward Bates*, 1859-1866, ed., H. K. Beale (Washington, 1933), Vol. IV (1930), p. 271.

[8] MS, L.P., No. 20470, Stanton to Lincoln, Washington, D. C., December 26, 1862.

[9] MS, L.P., No. 20551, Chase to Lincoln, Washington, D. C., December 29, 1862.

[10] MS, L.P., Nos. 20461, 20467, Seward to Lincoln, Washington, D. C., December 26, 1862.

for their welfare which will endear Lincoln's name to them forever." The Postmaster General further stated: "I think the measure will be distasteful to the people generally, the legality of the act will be questioned, and the reply we have to give is as I have said, technical only. I cannot say the measure has the sanction of the people of Virginia or even of the majority of loyal people of that State."[11] Mr. Welles thought that statehood should be deferred until the war was over between the sections. The Secretary of the Navy said: "I do not, therefore, deem it expedient that West Virginia should be erected into a State, nor advise that the bill be approved."[12] Attorney General Bates was of the opinion that the bill was unconstitutional and "highly inexpedient." He based his contention on the grounds that "the government of Virginia, recognized by Congress and the President, is a government of necessity, formed by that power. This government represented a small fraction of the State. The representatives of some 48 counties made an agreement with themselves to partition the State."[13]

One cannot be completely assured that Lincoln's decision on the bill was based entirely on the well-prepared documents presented to him by individual members of his cabinet between December the twenty-third and December the twenty-ninth, 1862. Nevertheless, there was a definite correlation between Lincoln's views and the ideas of the affirmative group on the bill in the divided cabinet. The Commander-in-Chief's views were clearly brought out in a document entitled "Opinions on West Virginia." They were as follows:

> The consent of the legislature of Virginia is constitutionally necessary to the bill for the admission of West Virginia becoming a law. We cannot deny that the body which consents to the admission of West Virginia is the legislature of Virginia. . . . It is said that the admission of West Virginia is secession and tolerated only because it is our secession. Well, if we call it by that name, there is still difference enough between secession against the Constitution and secession in favor of the Constitution. I believe the admission of West Virginia into the Union is expedient.[14]

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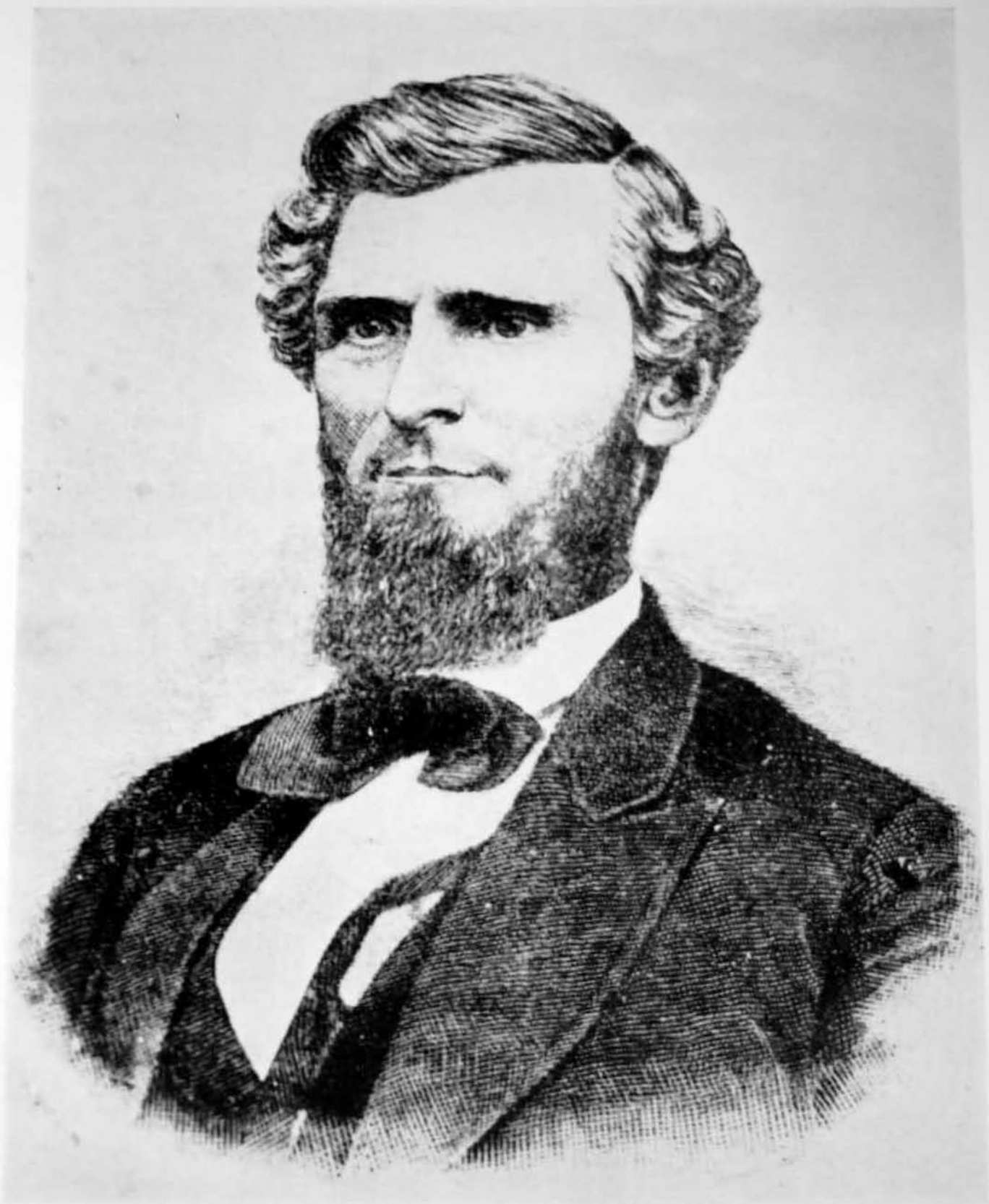
[11] MS, L.P., No. 20450, Blair to Lincoln, Washington, D. C., December 26, 1862.
[12] MS, L.P., No. 20592, Welles to Lincoln, Washington, D. C., December 29, 1862.
[13] MS, L.P., Nos. 20476, 20481-82, Washington, D. C., December 27, 1862.
[14] MS, L.P., Nos. 20625-20638, Lincoln's Views on West Virginia Statehood, Washington, D. C., March 2, 1865.



Arthur Ingraham Boreman, the first governor of West Virginia

Despite the legality of the bill, it is believed that Lincoln had no intention of issuing a proclamation granting statehood to West Virginia until the people of the Mountain Region had complied with the request of Congress by ratifying an amendment to their Constitution which provided for gradual emancipation of all slaves[15] within the proposed borders of the new State. Such an amendment was later known as the Willey Amendment.

When President Lincoln was officially notified of the vote on the Willey Amendment by Abraham Soper, President of the Constitutional Convention (held at Wheeling), the Chief Executive, on April 20, 1863, issued a proclamation proclaiming West Virginia a State. It became fully effective 60 days later. At the expiration of the sixty days (June 20, 1863), Arthur Ingraham Boreman was inaugurated as the first governor of the newly-created State of West Virginia.

The original letters of President Lincoln and members of his cabinet on the constitutionality and expediency of West Virginia Statehood will be arranged in this study as follows:

1. Lincoln to his Cabinet.
2. Blair to Lincoln.
3. Seward to Lincoln.
4. Bates to Lincoln.
5. Stanton to Lincoln.
6. Chase to Lincoln.
7. Welles to Lincoln.
8. Lincoln's opinions on Constitutionality and Advisability of Admitting West Virginia into the Union.

Letter—Lincoln to United States Cabinet, Washington, D. C., December 23, 1862.

Executive Mansion,

Washington, December 23, 1862.

Gentlemen of the Cabinet

A bill for an Act entitled "An Act for the admission of the State of "West Virginia" into the Union, and for other purposes," has passed the House of Representatives, and the Senate, and has been duly presented to me for my action.

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[15] Wheeling *Daily Intelligencer*, January 31, 1863. This paper praised Lincoln for his courage in issuing a proclamation freeing Negroes in "The rebellious districts of the Union." Cf. Wheeling *Daily Intelligencer*, January 2, 1863.

I respectfully ask of each [of] you, an opinion in writing, on the following questions to wit:
1st., Is the said Act constitutional?
2nd., Is the said Act expedient?[16]

Your Obt, Servt.
Abraham Lincoln

Letter—Montgomery Blair to President Lincoln, Washington, D. C., December 26, 1862.

The President.
Sir:

On the questions submitted by you relating to the admission of West Virginia into the Union. I submit the following considerations:

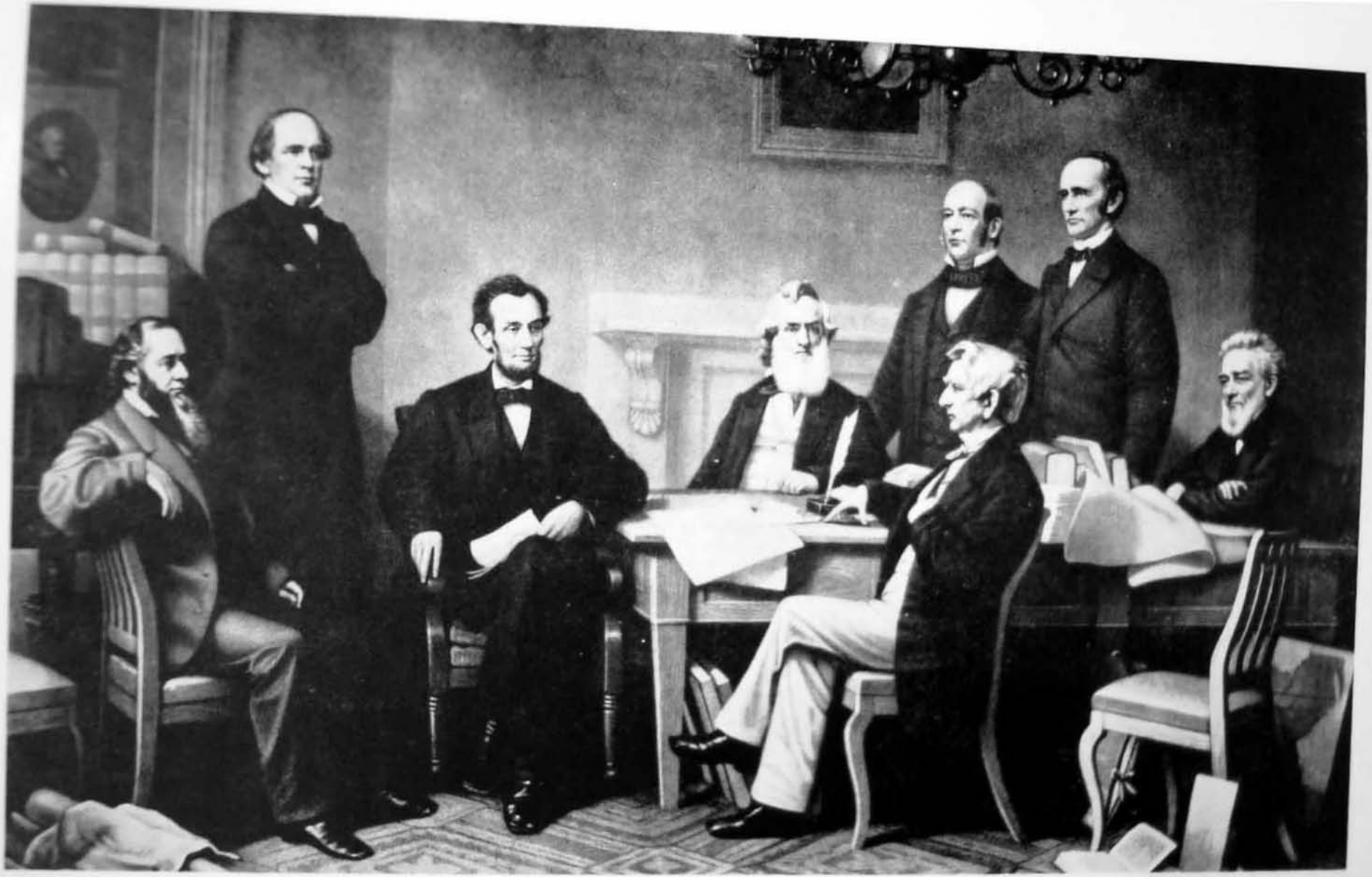
1. **As to the Constitutional Question.**

The first clause of the third section of the fourth article of the Constitution provides that "New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States without the consent of the States concerned as well as of the Congress." The objection that this language in the present case requires the consent of both East and West Virginia because it requires the consent of both[17] the States concerned, seems to me not to be well taken, because 'till West Virginia be admitted there are not two States concerned.

The question is only whether the State of Virginia has consented to the partition of her Territory and the formation of that part of it called Western Virginia into a separate State. In point of fact it will not be contended that this has been done, for it is well known that the Elections by which the movement has been made did not take place in more than a third of the counties of the State, and the votes on the Constitution did not exceed twenty-thousand.

The argument for the fulfillment of the constitutional provisions applicable to this case rests altogether on the fact that the Government organized at Wheeling in which a portion of the District in which it is proposed to create the new State is represented with a few of the Eastern Counties has been recognized as the Government of the State of Virginia for certain purposes[18] by the Executive and Legislative branches of the Federal Government, and it is contended that by these acts the Federal Government is estopped from denying that the consent given by this Government of Virginia to the creation of the new State, is a sufficient consent within the meaning of the Constitution. It seems to me to be a sufficient answer to this argument to say: **First,** that it is con-

[16] MS, L. P., No. 29387, Lincoln to U. S. Cabinet, Washington, D. C., December 23, 1862.
[17] MS, L.P., No. 29438, Blair to Lincoln, Washington, D. C., December 26, 1862.
[18] Ibid., No. 29439.



President Lincoln and his Cabinet. Standing from left to right are Salmon P. Chase, Secretary of the Treasury; Caleb B. Smith, Secretary of the Interior; Montgomery Blair, Postmaster General; seated left to right are Edwin M. Stanton, Secretary of War; Abraham Lincoln, President; Gideon Welles, Secretary of the Navy; William H. Seward, Secretary of State and Edward Bates, Attorney General. (Library of Congress)

fessedly merely technical, and assumes unwarrantably, that the qualified recognition which has been given to the Government at Wheeling for certain temporary purposes, precludes the Federal Government from taking notice of the fact that the Wheeling Government represents much less than half the people of Virginia when it attempts to dismember the State permanently. **Second**, that the present demand of itself, proves the previous recognitions relied on to enforce it to be erroneous. For unquestionably,[19] the 4th article of the Constitution prohibits the formation of a new State within the actual consent of the old State, and if it be time that we have so dealt with a third part of the people of Virginia as that to be consistent we should now permit that minority to divide the State, it does not follow that we should persist, but on the contrary it demonstrates that we have heretofore been wrong, and if consistency is insisted on, and is deemed necessary, we should secede from the positions heretofore taken.

2. **As to the Expediency of the Measure.**

But I do not think it either necessary to secede from those positions or proper to take the new step insisted on now. There is no positive prohibition in the Constitution against the action taken by the Senate and House of Representatives in relation to the recognition of the[20] Wheeling Government, or in relation to the action taken by the Executive, and all that can be said if we reject the claim of the Wheeling Government to represent the people of Virginia for the purpose now under consideration will be that it admits our previous action to have been irregular. The answer to this is that if not regular it was substantially just and the circumstances of the case excuse the irregularity. First was proper that the loyal people and the State of Virginia should be represented in Congress, and the representation allowed was not greater than their numbers entitled them to. But whilst it was just to the people of Western Virginia, whose county was not over-run by the rebel armies to allow this representation, and for this purpose and for the purposes of local government to recognize the state Government instituted by them, it would be very injust to the loyal people in the greater part of the State, who are now held[21] in subjection by rebel armies, and who far exceed in number the twenty thousand who have voted on the Constitution for Western Virginia, to permit the dismemberment of their State without their consent. It is no fault of the loyal people of Virginia that they are not in condition to be heard on this question according to the forms of law. The State is held by armies which they could not resist, and which so far the Federal Government itself has not been able to eject from the State. If these armies were driven from the State, and the people still refused to recognize their obligations to the General Government, their wishes might be properly disregarded in the action of that government with respect to the question before us. But until that is done, I think a measure which affects

[19] *Ibid.*, No. 20440.
[20] *Ibid.*, No. 20441.
[21] *Ibid.*, No. 20442.

them so greatly should be postponed. If harried through now, it will probably be the source of lasting irritation between the people of the two section of[22] the State—and it will I am sure from the only obstacle, but a most serious one to an immediate restoration of the proper relations of the State to the General Government after the rebel armies are driven from it.

But there are yet more important considerations which would induce me to postpone this movement. It has been said with truth that Western Virginia has been a stepchild to the Eastern portion of the State where hitherto all political power has resided—And it is the injustice and oppression—the disfranchisement—and unequal taxation which has been exercised by the ruling class in the commonwealth for many long years which has alienated the people of the West. These wrongs have been familiar to me from childhood for among the people of Kentucky they found warm sympathy. It is not therefore from want[23] of sympathy with them that I oppose their wishes at this moment—But it is because in my view of the situation at present the days of their tyrants have passed away never to return and the hour is near when they have but to reach forth their hands and redress not only their own grievances but to restore the old commonwealth to honor and power in the Sisterhood of States—Each county as we remove the armed rebel hordes now overrunning the State will affiliate with the free government of the west and of the Union and the men of the west who have lead the vanguard of freedom in the State will naturally control the policy of the Regenerated State—what a glorious prospect thus opens to a state with one front on the Ocean with such a port as Hampton Roads, and another front on a great tributary of the Mississippi River. Give the people of the west time to consider this subject in the light of events which cannot be distant and which will open to their view the power they will possess to make the State of[24] Virginia one of the greatest of the new world and they will thank the Statesman who refused his sanction to their wishes formed amidst the exasperations of Civil War and a sense of wrongs which they will soon see can never be perpetrated again.

If ever there was a case of hasty legislation calling for the interposition of the Executive this bill is one of that kind. No measure of such importance to the interests of a great people was ever passed through Congress with so little discussion. The condition of the country when the bill was before the Senate and House of Representatives seems to have so occupied the attention of the able men in those bodies, that they seem with rare exceptions not to have appreciated the importance of the measure, and it lead to but little discussion in either house. The only consideration which seems to have invoked favor or opposition was the fact that a free state was to be made of the[25] part to be erected into a new State. This consideration would weigh with me if I believed the

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[22] Ibid., No. 20443.
[23] Ibid., No. 20444.
[24] Ibid., No. 20445.
[25] Ibid., No. 20446.

Union was to be divided and that the Eastern portion of the State was to be left the Rebels and to Slavery. But I look for neither result. I do not believe disunion possible and I shrink from a measure which looks like preparing for it.

But as the reestablishment of the Federal power in Eastern Virginia extinguishes Slavery there and thus removes the great cause of oppression upon the west and at the same time puts the power of the State in the hands of those who have been oppressed, every ground upon which the measure was advocated will be speedily removed.

The bugbear of the indebtedness created by the Rebel Legislature which is provided by the friends of the measure, is easily disposed of. It will be repudiated of course by the true Legislature of the State. As respects the old and legal debts of the State the benefits of[26] which it is alleged have not been fairly apportioned between the east and the west,—the new Regime will have the power to regulate the subject fairly and will doubtless do so. The Federal government might aid them greatly in this object and at the same time contribute greatly to the reconstitution of society in the State upon a healthy basis by turning over to the State the forfeited estates of traitors within it. The forfeitures will be more thoroughly enforced by such means and the property more rapidly passed into the hands of new men whose tenure will be fealty to the new order of things in the State and to the old flag of the Union. But without any pecuniary help from the Federal government the boon of Freedom which the Federal arms will ere long give to the State will soon bring wealth to it which will make these old debts light, and all the more rapidly if the old boundaries are preserved so that the enlightened and[27] enterprising men of the west who will rule in the councils of the great commonwealth are not shorne of their power by this measure.

The idea that the mountains which divide the sections require the proposed political division has become obsolete by the use of Railroads and Canals. What sane man would propose to divide the State of Pennsylvania which is divided physically by the same ranges of Mountains? What irreparable mischief would have been done to that magnificent State if such a sacrifice had been made of her real and permanent interests on account of some temporary wrongs, as is now proposed with respect to the interests of Virginia for reasons not worth a thought to a Statesman? It may at this moment please the Western Virginians to favor a measure so cruel to the great interests of the State—But in my judgment the time is not[28] far removed when no man among them would regard the measure otherwise than a Western Pennsylvanian would now regard a proposition to dismember that State—and I believe if the President refuses his sanction to the measure because it is pernicious to their best interests, the people of West Virginia will soon

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[26] *Ibid.*, No. 29447.
[27] *Ibid.*, No. 29448.
[28] *Ibid.*, No. 29449.

see in such refusal a thoughtfulness for their welfare which will endear his name to them forever.

I think the measure will be distasteful to the people generally. The legality of the act will be questioned and the reply we have to give is as I have said technical only. We cannot say truly that the measure has the sanction of the people of Virginia or, even to the majority of the loyal people of that State—we cannot plead **necessity** for the act as we have for other acts which have been questioned. It will serve therefore to fix upon the dominant party here the charge of disregarding the law and the constitution by which our adversaries have sought to destroy the[29] confidence of the people in the administration.

The subject is one which will engage public attention hereafter if not immediately so that our action on it will characterize the administration in the annals of the country. It is with the rights of the states we are dealing—we have heard indeed something too much of such things lately and some persons may therefore be disposed at this moment to ignore them altogether. But this will be found to be a great error. The people of all the States have always manifested a wisė solicitude for the just rights of the States and have never tolerated the slightest invasion of them. This arises not from mere state pride or vanity so ostentatiously displayed by Coxcombs. It is founded on the knowledge possessed by the thinking and controlling minds that the excellence of our system of government depends on carefully guarding those rights. In dismembering the State which has still a hold on the hearts of[30] our people as the land of Washington, Jefferson, Madison, Monroe and other immortal names, there should therefore be no room for debate on the legality of the act.[31]

Very respectfully
your obt. sert.
M. Blair
P.M.G.

P. O. Dept.
Washington, D. C., December 26, 1862.

Letter—William H. Seward to President Lincoln, Washington, D. C., December 26, 1862

To the President of the United States

Western Virginia is organized unquestionably with all the constitutional elements and faculties of a State, and with a republican form of government. It, therefore, has a title to be a candidate for admission into the Federal Union. Congress has power to admit new States, but is a power restricted within certain limitations. One of these limitations is that no new State shall be formed or erected within the jurisdiction of any other State without the consent of that State as well as the consent

[29] *Ibid.*, No. 20450
[30] *Ibid.*, No. 20451.
[31] *Ibid.*, No. 20452.

of the new State and the consent of Congress. It is an undisputed fact that the new State of Western Virginia has been both formed and erected within the jurisdiction of the State of Virginia. Has the consent of the State of Virginia to the formation and erection of the State of West Virginia been given, or has it not been given? Upon this point the constitutionality of the Act of Congress now before me turns. The constituted and regular authorities of a State called the State of Virginia sitting at Wheeling, within the jurisdiction of that State, claiming to be the State of Virginia, and acting as such, have in a due and regular manner declared and given the consent of the State of Virginia to the formation and erection of the State of West Virginia within the jurisdiction of the State of Virginia. Thus far the case seems simple and clear. But it is just at this point that a complication begins. If we would unfold it successfully we must first state the existing facts in regard to the constitutional position of[32] the State of Virginia, as well as those which belong to the formation and erection of the new State of West Virginia.

About the month of April, 1861, an insurrection against the Federal Union broke out within the State of Virginia. The constituted authorities, with the seeming consent of a majority of the People of the State, inaugurated a revolutionary war which they have carried to the extreme points of pronounced independence and of the setting up of a pretended revolutionary and belligerent government. The organized political body which has committed this treason, having broken and trampled under its feet the Constitution, and even the Union, of the United States, is still standing in that treasonable attitude within the jurisdiction of the State of Virginia, but it has been dislodged from the portion of that jurisdiction which is contained within the new State of West Virginia. This organization has not given its consent to the formation and erection of the State of Western Virginia, and in its present attitude it is clear that it neither can nor will give that consent. The State of Virginia having thus fallen into revolution, the people living within that part of its jurisdiction which is embraced within the new State of West Virginia, adhering in their loyalty to the State of Virginia and also to the United States, availed themselves of the fortune of the civil war to discard the treasonable authorities of Virginia, reorganized the State, and with all needful forms and solemnities chose and constituted the public functionaries for the state as nearly in conformity with the constitution of Virginia as in the revolutionary condition of that State was practicable. The State[33] of Virginia, thus organized, appeared in Congress by its representatives in both Houses and was then deliberately acknowledged and recognized by the Executive, as well as by the Legislature of the United States, as the State of Virginia, one of the original members of the Federal Union. This State of Virginia, thus constituted and acknowledged, has given its consent to the formation and erection of the State of West Virginia, within the jurisdiction of the State of Virginia. Why is not this consent an adequate one?

[32] MS., L.P., No. 29461, Seward to Lincoln, Washington, D. C., December 26, 1862.
[33] Ibid., No. 29462.

We can object to it only on the ground that the political body which gave the consent is not in fact and in law really the State of Virginia. It is replied with great force that the United States are estopped from assuming that position. I do not think it necessary, however, to rely upon that ground. There is no need of the plea of estoppel when justice can be done without it, and, whatever may be the force of an estoppel in law when it works injustice, it ought not to be allowed in politics when it works in that way. It seems to me that the political body which has given consent in the case is really and incontestably the State of Virginia. So long as the United States do not recognize the secession, departure, or separation of one of the States, that State must be deemed as existing and having a Constitutional place within the Union, whatever may be at any moment exactly its revolutionary condition. A State thus situated cannot[34] be deemed to be divided into two or more states merely by any revolutionary proceeding which may have occurred, because there cannot be constitutionally two or more States of Virginia. There must and can be, in the view of the Constitution, at all times only one State of Virginia. Here are two distinct political bodies, each asserting itself to be that one State of Virginia. Some constituted power must decide this dispute. The point in dispute necessarily affects the Federal Union. No matter whether the one or the other of these two bodies is the real State of Virginia, the Federal Union has authority to maintain within the State, which cannot and must not be left in abeyance, and the body which is truly the State of Virginia has rights and holds obligations upon the Federal Union which must be conceded and fulfilled. The United States must therefore decide for themselves, so far as their rights and responsibilities extend, which of the two political bodies asserting themselves respectively to be the State of Virginia is truly the State, and which is not. The United States are not shut up within a necessity for deciding it in favor of either body. They can say that, although the old organization is for the present moment disloyal, treasonable, and insurrectionary, yet it shall not be deprived of its powers and privileges. Or they may say on the other hand, that this old organization has forfeited and lost[35] its right to be regarded as a constitutional one, and it shall be suppressed, and a new and loyal one, constituted in its place, shall be acknowledged as the State of Virginia, and dealt with accordingly. It is a practical question, to be decided by the United States upon the grounds of public necessity or expediency, with a view to the best and permanent interests of the State of Virginia and of the United States. As I have already intimated, the question has been heretofore decided by the United States in favor of the new and against the old organization. The newly organized State of Virginia is therefore, at this moment, by the express consent of the United States, invested with all the rights of the State of Virginia, and charged with all the powers, privileges and dignity of that State. If the United States allow to that organization any of these rights, powers and privileges, it must be allowed to possess and enjoy them all. If it be a state

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[34] Ibid., No. [illegible].
[35] Ibid., No. [illegible].

competent to be represented in Congress and bound to pay taxes, it is a state competent to give the required consent of the State to the formation and erection of the new State of West Virginia within the jurisdiction of Virginia.

But in reply to this it is said that the new State of West Virginia includes substantially all of the State of Virginia which is actually occupied by and submissive to the re-organized State of Virginia, so that this re-organized[36] State of Virginia must cease to exist the moment that by its consent the State of West Virginia shall have come into the Federal Union. This argument seems to me unsatisfactory and inconclusive. Western Virginia will not then be the State of Virginia, nor will the State of Virginia cease to exist, although, through accidents of Civil War, there shall for the moment be no loyal and constitutional political organization of the state. Within that part of the jurisdiction of the original State of Virginia which will remain, there will still be a State of Virginia, the old State, with its constitutional functions wholly or in part suspended or in abeyance, but capable of complete reconstruction and re-organization by its people, just as the state was re-organized and reconstructed when the government now at Wheeling was organized. If it be said that this is unjust to the State of Virginia, I answer that the constitutional reservation of a right on the part of that State to object to the foundation and erection of a new State within her limits, was a reservation for her benefit. If, through perverseness and disloyalty, a majority of her people, in a revolutionary way, put themselves into a condition in which they cannot and will not assert that right, they cannot by that wrongful and injurious course deprive the loyal people of Western Virginia of their claim to be heard when, in a[37] constitutional manner, they form and erect a new State, or deprive Congress of the power to decide the question as the interests and the safety of the whole country require.

I am therefore of opinion that the Act for the admission of West Virginia is a constitutional one.

Upon the question of expediency I am determined by two considerations. First, The people of Western Virginia will be safer from molestation for their loyalty, because better able to protect and defend themselves as a new and separate State, than they would be if left to demoralizing uncertainty upon the question whether, in the progress of the war, they may not be again reabsorbed in the State of Virginia, and subjected to severities as a punishment for their present devotion to the Union. The first duty of the United States is protection to loyalty wherever it is found. Second, I am of the opinion that the harmony and peace of the Union will be promoted by allowing the new State to be formed and erected, which will assume jurisdiction over that part of the valley of the Ohio which lies on the South side of the Ohio river, displacing, in a constitutional and lawful manner, the jurisdiction here-

[36] Ibid., No. 2546.
[37] Ibid., No. 2546.

tofore exercised there by a political power concentrated at the head of the James river.[38]

Respectfully Submitted,
William H. Seward

Department of State
Washington. December 26, 1862.

Letter—Edward Bates to President Lincoln, Washington, D. C., December 27, 1862

Attorney General's Office
December 27, 1862

The President having before him for his approval a bill passed by both Houses of Congress, entitled an "Act for the admission of the State of West Virginia into the Union, and for other purposes," has submitted to all the members of the Cabinet, separately, the following questions, for their opinion and advice thereon.

1. Is the said act constitutional?
2. Is the said act expedient?

I am of opinion that the bill is not warranted by the Constitution. And, in examining this proposition, I think it will be the more clearly apprehended, if viewed in two aspects:—1. In the letter of the particular provision, and 2. In the spirit, as gathered from the letter, from the whole context, and from the known object, and

First, the letter—Art. 4, S. 3. "New States may be **admitted** by the Congress into this Union; but no State shall be **formed or erected**, within the jurisdiction of any other state, nor any state **be formed** by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress." I observe, in the first place, that the Congress can **admit** new States into this Union, but cannot **form** States: Congress has no creative power, in that respect; and cannot[39] admit into this Union, any territory, district or other political entity, less than a State. And such State must exist, as a separate independent body politic, **before** it can be admitted, under that clause of the Constitution—and there is no other clause. The new State which Congress may admit, by virtue of that clause, does not owe its existence to the fact of admission, and does not begin to exist, coeval with that fact. For, if that be so, then Congress **makes** the State; for no power but Congress can admit a State into the Union. And that result, (i.e. the making of the State by Congress) would falsify the universal and fundamental principle of this country, that a free American State can be made only by the people, its component members. Congress has no power to **make** a State.

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[38] Ibid., No. [illegible]
[39] MS. L.P., No. [illegible], Bates to Lincoln, Washington, D. C., December 27, 1862.

It is not very important to my argument whether the last clause of the sentence quoted—"without the consent of the legislatures of the States concerned, as well as of the Congress," do nor do not apply to the case of a new State "formed or erected within the jurisdiction of any other State," as well as to the case of a new State "formed by the junction of two or more States or parts of States." If it do **not** apply, then, there stands the naked unconditional prohibition of the **formation** of a new State, within the jurisdiction of any other state—direct, simple, and incapable of being misunderstood.

If, admitting that the clause does not apply, it be claimed that the prohibition is overruled and annuled[40] by practice, in the case of Maine, Kentucky and Tennessee, which were, respectively, "formed and erected within the jurisdiction" of Massachusetts, Virginia and North Carolina, I have two, alternative answers—1. In the absence of proof to the contrary, I assume, that both Congress and the people did obey the Constitution, and fulfill all its requirements, in form and substance. 2. If it be shown that, in those instances, the Constitution was disregarded and broken, still I insist that those abuses, do not absolve us from the duty to obey the plain letter and sense of the Constitution.

But if the clause do [sic] apply, still, in this case, its terms have not been complied with. It speaks in the plural—"the legislatures of the States concerned"—i.e. Virginia and West Virginia. The consent required by the Constitution is not the consent of the State, generally, nor of its Governor, nor its Judiciary, nor its Convention, but "the consent of the **Legislatures** of the States concerned." And that is not the only instance in which the Constitution vests long important powers in the Legislatures of the States—they choose the Senators absolutely, and they direct the manner in which electors of President and Vice-President shall be chosen. And these are Constitutional functions which cannot be exercised by substitute, nor usurped by any other functionary. The division and allotment of powers, as established by the Constitution is not **mere form,** but vital substance, dear to our fathers, who designed and used it as a guard against the unity of powers—to prevent the concentration of power[41] in a single hand or a few hands. Here the proposition is to make two states out of one. Each one, of course, must have a legislature, and the Constitution requires the consent of both legislatures, before the thing can be done. Now, it is said that the legislature of Virginia (Old Virginia) has consented; but it is not pretended that the legislature of West Virginia has consented—nor that there is, in fact, any such legislature to give consent.

It is a very grave and important thing to cut up and dismember one of the original States of this nation—for a time, in our national youth, the greatest of all—and if we must do it, it behooves us to **know** that we are acting within the letter of the Constitution, and with a decent respect for the forms of law.

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[40] Ibid., No. 20477.
[41] Ibid., No. 20478.

So much for the letter of the law. Let us now examine a little into the sense and spirit of it.

When the rebellion broke out, all the State authorities of Virginia joined it, and made organized and official, as well as individual, insurrection, against the national government, defying its power, and, in order the more effectually to resist it, inviting invasion from States further South. Still a remnant, chiefly in the northwestern counties, remained faithful; and the duty rested upon this government to protect that remnant; to repel that invasion and suppress that insurrection; and thereby to restore Virginia, as she was before the insurrection, to her proper place in the Union. That was and is the plain constitutional duty[42] of this government; and all that this government has yet done, by legislation, by executive action, or by actual war, has been done with that avowed and only object.

When all the governmental officers of the state of Virginia acting in organic form, had renounced their allegiance to the Constitution, and had risen, in armed revolt against the nation, carrying along with them, into flagrant war, a great majority of the people of the State, this government found itself in a strange and anomalous condition. It was charged with duties which could be neither denied nor evaded; and constrained to the use of powers, which undoubtedly exist in contemplation of law, and yet the modes of their action had not been prescribed, only because the necessity to put those powers into practical exercise had not been foreseen.

In this state of things, we took the only course which lay open before us—a course of prudence, of moderation, and of conformity to the principles and objects of the Constitution. It was our sacred duty to suppress the insurrection, to repel the invasion, to put down the official treason in Virginia, which had perverted all the organic powers of the state, into active hostility against the nation. And in performing this duty, we could do no less than recognize all of Virginia which remained faithful to the Constitution, and which demanded the protection and support of the national government.

In this view, and only in this, we advised[43] and consented to the organization of a new government for Virginia, seated, for the present, in the northwest, where alone it could act in safety. Those who organized that government were a small minority, but they were all that remained to us and to the Constitution. And we all knew (certainly I did) that such a government could not be organized by such a people, at such a time, and under such circumstances, in exact conformity to all the minute requirements and particulars of the Virginia Constitution. But, for that reason—for the crimes of a comparatively few individuals which render an exact compliance with forms impossible, shall a nation be allowed to perish, a State be blotted from the map of the world? No, God forbid. The substance must not be sacrificed to the forms.

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[42] Ibid., No. 30479.
[43] Ibid., No. 30480.

Our first great Constitutional duty is to save the nation, and the States: and, if possible, we must save them according to law. But if the two duties conflict, still the greater must be performed, and the lesser must yield, even as a conflicting act of Congress must yield to the Constitution.

We all know—everybody knows—that the government of Virginia, recognized by Congress and the President, is a government of necessity, formed by that power which lies dormant in every people, which though known and recognized, is never regulated by law, because its exact uses and the occasions for its use, cannot be foreknown, and it is called into[44] exercise by the great emergency which, overturning the regular government, necessitates its action, without waiting for the details and forms which all regular governments have. It is intended only to counteract the treacherous perversion of the ordained powers of the State, and stands only as a political nucleus around which the shattered elements of the old commonwealth may meet and combine, in all its original proportions, and be restored to its legitimate place in the Union. It is a provisional government, proper and necessary for the legitimate object for which it was made and recognized. That object was not to divide and destroy the State, but to rehabilitate and restore it.

That government of Virginia, so formed and so recognized, does not and never did, in fact, represent and govern, more than a small fraction of the State—perhaps a fourth part. And the legislature which pretends to give the consent of Virginia to her own dismemberment, is, (as I am credibly informed) composed chiefly if not entirely of men who represent those forty-eight counties which constitute the new State of West Virginia. The act of consent is less in the nature of a law than of a contract. It is a grant of power, an agreement to be divided. And who made the agreement, and with whom? The representatives of the forty-eight counties, with themselves! Is that fair dealing? Is that honest legislation? Is that a legitimate exercise of a constitutional power, by the **legislature** of[45] Virginia? It seems to me that it is mere abuse, nothing less than attempted **secession**, hardly veiled under the flimsy forms of law.

Fortunately, however, even that flimsy veil does not cover the substantial wrong. I think I have already shown that under either construction of the clause of the Constitution above cited, the forms of the Constitution have not been fulfilled. The bill was introduced and has been thus far pushed forward towards its completion, under the erroneous idea that it was in verbal and technical conformity to the Constitution, and therefore, and only therefore, that it could ever ripen into a binding law. That was its only foundation; for I think that no reflecting man will seriously affirm that "the legislature of Virginia" which, at Wheeling, on the 13th of May, 1862, gave **its** consent (not the consent of Virginia) to the dismemberment of the Old Commonwealth, was, in truth and honesty, such legislature of Virginia as the Consti-

[44] Ibid., No. 2648.
[45] Ibid., No. 2662.

tution speaks of—a legislature representing and governing the whole, and therefore honestly and lawfully speaking for the whole, in a matter which concerns the fundamental conditions of the State, and its organic law.

In proceeding to answer the second question—"Is the said act expedient?"—it becomes necessary to look into the bill itself. It is a strange composition, bearing upon its face, unmistakable marks of haste and inconsideration.[46]

The preamble, after various recitals, gives the consent of Congress, "that the **forty-eight counties** (which may be formed into a separate and independent state)."

The first section declares "that the State of West Virginia be, and is hereby declared to be one of the United States of America, and admitted into the Union, on an equal footing with the original States, in all respects whatever," and allows three representatives, until the next general census. But this is immediately followed by a provision. "That this act shall not take effect until after the proclamation of the President of the United States hereinafter provided for." Which proclamation, very possibly, may never happen, for there is no after-provision in the bill, making it the duty of the President to issue it.

Then follows a paragraph (which seems to be only a preamble to § 2) to the effect that "it being represented to Congress that, since the convention of the 26th of November, 1861, which framed the **proposed** Constitution for the said State of West Virginia, the people thereof have expressed a wish to change the seventh section of the eleventh article of said Constitution by striking out the same and inserting the following"—giving the exact form of what Congress chooses to have inserted in the State Constitution! The bill does not inform us when, how, or by whom it was "represented to Congress," that the People wished to change their Constitution[47] so recently made by their convention, and ratified by their own votes, as stated with exact particularity in the preamble. If the people of West Virginia had a right to call a convention and make a Constitution for themselves, what is to hinder them from amending the one or making another by the same means and without waiting for Congress to instruct them what to do and how to do it? **It looks hardly. However pure the real motive, it lays Congress** open to the suspicion of assuming unconstitutional powers, by dictating to a State, in a matter so important and so enduring as its Constitution.

And the second section brings no relief, but strengthens the suspicion and magnifies the evil. "**Therefore,** Sec. 2. Be it further enacted, That **whenever** the People of West Virginia shall, through their **said** convention, and by a vote," etc. "make and ratify the **change aforesaid,** and properly certify" etc. "**it shall be lawful** for the President of the United States to issue his proclamation stating the fact, and thereupon this act

[46] *Ibid.*, No. 20483.
[47] *Ibid.*, No. 20484.

shall take effect and be in . . . force from and after sixty days from the date of said proclamation."

In view of this section, it is manifest that the very existence of the Act, even after you have signed it, is made to depend upon the implicit obedience of the people of West Virginia. They must "make and ratify the **change aforesaid,**" and in the precise manner prescribed. They cannot choose new agents to amend[48] their own constitution. They must do it "through their **said** convention"—the same which sat at Wheeling on the 26th of November, 1861. None other can be trusted! Perhaps that convention is no longer in existence. It was called for a particular purpose, and having done its work, and the people having ratified it—perhaps the convention is **functus officio,** dead and gone. Surely it was not intended as a permanent institution, to last through all times. Yet that seems to be the idea of the bill, for it fixes no limit of time—**whenever** the people shall do it, through their said convention.

Again, when all this is done, as **ordered,** still, the Act may fail and the new State perish in the birth, for want of a proclamation. The bill declares that "it shall be **lawful for the President** to issue his proclamation"; but it is not his duty to do whatever may be lawfully done. By express Act of Congress it is lawful for the President, by proclamation, as in this case, to close all the Southern ports, but he has not found it expedient to exercise the power.

I need not trouble you with many remarks upon the very awkward shape and inconvenient geographical relations, of the new State, and the still greater awkwardness and inconvenience in which the old state would be left, by the proposed division. Such a division, if[49] now made by force of untoward circumstances, could not long stand. Its evils would not be long endured.

I consider this proceeding revolutionary, all the more wrong, because it is needlessly begun at a moment when we are strained to the uttermost, in efforts to prevent a far greater revolution. If successful, it will be "at once an example and fit instrument" for tearing into pieces the regions further south, and making out of the fragments, a multitude of feeble communities. And, for what good end? We may thereby stimulate the transient passions and prejudices of men in particular localities, and gratify the personal ambition and interest of a few leaders in those little sections. We may disjoint the fabric of our national government, and destroy the balance of power in Congress, by a flood of senators representing a new brood of fragmentary States.

And now, Sir, I give it as my opinion that the bill in question is unconstitutional; and also, by its own intrinsic demerits, highly inexpedient.

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[48] Ibid., No. 2048.
[49] Ibid., No. 2048.

And I persuade myself that Congress, upon maturer thought, will be glad to be relieved by a veto, from the evil consequences of such improvident legislation.[50]

All which is, most respectfully submitted,
by your obedient servant,
Ed. W. Bates
Attorney General

To the President
of the United States

Letter—Edwin M. Stanton to President Lincoln, Washington, D. C., December 26, 1862

WAR DEPARTMENT

Washington City, D. C.
December 26th, 1862

Sir,

In conformity with your request for my written opinion in respect to the constitutionality and expediency of the Act of Congress "for the admission of the State of West Virginia into the Union and for other purposes," I answer

1st. That in my opinion the above mentioned Act of Congress is constitutional.

2nd. It is, in my judgment, expedient.

Some of the reasons for the foregoing opinions may be briefly stated.

The Constitution expressly authorizes a new State to be formed or erected within the jurisdiction of another state. The Act of Congress is in pursuance of that authority. The measure is sanctioned by the Legislature of the State within whose jurisdiction the new State is formed. When the new State is formed, its consent can be given, and then all the requirements of the[51] Constitution are complied with. I have been unable to perceive any point on which the Act of Congress conflicts with the Constitution.

By the erection of the new State, the geographical boundary heretofore existing between the free and slave states will be broken, and the advantage of this upon every point of consideration surpasses all objections which have occurred to me on the question of expediency. Many prophetic dangers and evils might be specified, but it is safe to suppose that those who come after us will be as wise as ourselves and if what we deem evils be really such, they will be avoided. The present good is real and substantial, the future may safely be left in the care

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[50] Ibid., No. [illegible]
[51] MS. L.F., No. [illegible], Stanton to Lincoln, Washington, D. C., December 26, 1862.

of those whose duty and interest may be involved in any possible future measures of legislation.

I have the honor to be
Very respectfully
Your obedient servant,
Edwin M. Stanton
Secretary of War

To The President

Letter—Salmon P. Chase to President Lincoln, Washington, D. C., December 29, 1862

Treasury Department
December 29, 1862

Sir,

My most thoughtful attention has been given to the questions which you have proposed to me as the Head of one of the Departments, touching the Act of Congress admitting the State of West Virginia into the Union.

The questions proposed are two:

1. Is the Act constitutional?
2. Is the Act expedient?

1. In my judgment the Act is constitutional.

In the Convention which framed the Constitution, the formation of new States was much considered. Some of the ablest men in the Convention, including all or nearly all the Delegates from Maryland, Delaware and New Jersey, insisted that Congress should have power to form new States, within the limits of existing States, without the consent of the latter. All agreed that Congress should have the power, with that consent. The result of deliberation was the grant to Congress of a general power to admit new States; with a limit on its exercise in respect to States formed within the jurisdiction of old States or parts of such, to cases of consent by the legislatures[52] of the States concerned.

The power of Congress to admit the State of West Virginia, formed within the existing State of Virginia, is clear, if the consent of the legislature of the State of Virginia has been given.

That this consent has been given cannot be denied, unless the whole action of the Executive and Legislative branches of the Federal Government for the last eighteen months has been mistaken, and is now reversed.

In April, 1861, a Convention of citizens of Virginia assumed to pass an Ordinance of Secession; called in rebel troops; and made common cause with the insurrection which had broken out against the Govern-

[52] MS. L.F., No. 2551, Chase to Lincoln, Washington, D. C., December 29, 1862.

ment of the United States. Most of the persons exercising the functions of State Government in Virginia joined the rebels, and refused to perform their duties to the Union they had sworn to support. They thus abdicated their powers of government in respect to the United States. But a large portion of the people, a number of members of the Legislature, and some judicial officers, did not follow their treasonable example. Most of the members of the Legislature who remained faithful to their oaths, met at Wheeling and reconstituted the Government of Virginia, and elected Senators in Congress who now occupy their seats as such. Under this reconstituted Government, a Governor has been elected, who now exercises Executive authority throughout the State, except so far as is excluded by armed rebellion. By repeated and most significant acts, the Government of the United States has recognized this Government of Virginia as the only legal and constitutional Government of the whole state.

And, in my judgment, no other course than this was open to the National Government. In every case of insurrection involving the persons exercising the powers of State Government, when a large body of the people remain faithful and that body, so far as the Union is concerned, must be taken to constitute the State. It would have been as absurd as it would have been impolitic to deny to the large loyal population of Virginia the powers of a State Government, because men whom they had clothed with Executive or Legislative or Judicial powers had betrayed their trusts and joined in rebellion against their country.

It does not admit of doubt, therefore, as it seems to me that the Legislature which gave its consent to the formation and erection of the State of West Virginia was the true and only lawful Legislature of the State of Virginia. The Madison Papers clearly show that the consent of the Legislature of the original State was the only consent required to the erection and formation of a new State within its jurisdiction. That consent having been given, the consent of the new State, if required, is proved by her application for[53] admission.

Nothing required by the Constitution to the formation and admission of West Virginia into the United States, is, therefore, wanting; and the Act of admission must necessarily be constitutional.

Nor is this conclusion technical as some may think. The Legislature of Virginia, it may be admitted, did not contain many members from the Eastern Counties. It contained, however, Representatives from all counties whose inhabitants were not either rebels themselves, or dominated by greater numbers of rebels. It was the only Legislature of the State known to the Union. If its consent was not valid, no consent could be. If its consent was not valid, the Constitution as to the People of West Virginia has been so suspended by the rebellion that a most important right under it is utterly lost.

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[53] Ibid., No. 20552.

It is safer, in my opinion to follow plain principles to plain conclusions than to turn aside from consequences clearly logical because not exactly agreeable to our views of expediency.

2. And this brings me to the second question. Is the Act of admission expedient?

The Act is almost universally regarded as of vital importance to their welfare by the loyal people most immediately interested, and it has received the sanction of large majorities in both Houses of Congress. These facts afford strong presumptions of expediency.

It is, moreover, well known that for many years, the people of West Virginia have desired separation on good and substantial grounds; nor do I perceive any good reason to believe that consent to such separation would now be withheld by a Legislature actually elected from all the Counties of the State and untouched by rebel sympathies.

However, this may be, much—very much—is due to the desires and convictions of the loyal people of West Virginia. To them, admission is an object of intense interest; and their conviction is strongly expressed that the veto of the Act and its consequent failure would result in the profound discouragement of all loyal men and the proportionate elation and joy of every sympathizer with rebellion. Nor is it to be forgotten that such veto will be regarded by many as an abandonment of the views which have hitherto guided the action of the Government in relation to Virginia; will operate as a sort of disavowal of the loyal Government; and may be followed by its disorganization. No act not imperatively demanded by Constitutional duty should be performed by the Executive, if likely to be attended by consequences like these.[54]

It may be said, indeed, that the admission of West Virginia will draw after it the necessity of admitting other States under the consent of extemporized Legislatures assuming to act for whole States, though really representing no important part of their territory. I think this necessity imaginary. There is no such Legislature, nor is there likely to be. No such Legislature, if extemporized, is likely to receive the recognition of Congress or the Executive. The case of West Virginia will form no evil precedent. Far otherwise. It will encourage the loyal by the assurance it will give of national recognition and support; but it will inspire no hopes that the National Government will countenance needless and unreasonable attempts to break up or impair the integrity of States. If a case parallel to that of West Virginia shall present itself, it will, doubtless, be entitled to like consideration; but the contingency of such a case is surely too remote to countervail all the considerations of expediency which sustain the Act.

My answer to both questions, therefore, is affirmative.

S. P. Chase

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[54] Ibid., No. [illegible].

Letter—Gideon Welles to President Lincoln, Washington, D. C., December 29, 1862

Navy Department
December 29, 1862

Sir:

The bill entitled "an act for the admission of the State of West Virginia, and for other purposes," which has passed the two Houses of Congress, will, if it becomes a law, divide the commonwealth of Virginia, and erect a new State within its jurisdiction.

The Constitution declares that "new States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States without the consent of the Legislatures of the States concerned as well as of the Congress."

While permission is herein granted to Congress and the Legislatures of the States directly interested to create a new State, there is, at the same time, a guarantee that the integrity of the States respectively shall be maintained, and that no new State shall be erected within the limits of any one of them without its consent.[55]

Has such consent of the Legislature and people of Virginia been obtained to the formation and erection within its limits of the proposed new State as to place it clearly and equivocally, in honest good faith, within the letter and spirit of the constitutional guarantees and requirements?

If the consent of the Legislature of the State of Virginia has been obtained in accordance with the constitutional design and intent, there is not, that I am aware, any constitutional objection to the measure. The decision should not, however, be a forced or mere technical one, for the dismemberment of a State against its wishes and in violation of the spirit of the Constitution will be fought with evil, now and in the future, to the State and to the Union.

An extraordinary condition of affairs exists at this time in Virginia and the country, and the period is not the most propitious opportunity for a calm and dispassionate consideration and decision of a measure of this gravity and importance.[56] A deep and wide-spread insurrection, having for its object a division of the Union, and taking on the forms of a government, is convulsing the country. Virginia is involved in this conspiracy. A large proportion of its territory is over-run by the insurgents, and the loyal feeling of its inhabitants suppressed by invasion. The Federal Government has failed, thus far, to extinguish the insurrection, or to expell the invaders or to abrogate the pretended form of government which they have established; and in the meantime, the loyal

[55] MS. L.P., No. 20583, Welles to Lincoln, Washington, D. C., December 29, 1862.
[56] Ibid., No. 20584.

citizens of a particular section of the State avail themselves of the occasion to forward a movement for the dismemberment of the commonwealth by proceedings which, having certainly their origin in a revolutionary state of facts, may be deemed in themselves somewhat revolutionary, and which, if carried into effect at this juncture, will be likely to aggravate our national troubles.

Under existing necessities, an organization of the loyal citizens, or of a[57] portion of them, has been recognized, and its Senators and Representatives admitted to seats in Congress. Yet we cannot close our eyes to the fact, that the fragment of the State which, in the revolutionary tumult, has instituted the new organization, is not possessed of the records, archives, symbols, traditions, or capital of the commonwealth. Though calling itself the State of Virginia, it does not assume the debts and obligations contracted prior to the existing difficulties. Is this organization then, really and in point of fact, anything else than a provisional government for the State? It is composed almost entirely of those loyal citizens who reside beyond the mountains, and within the prescribed limits of the proposed new State. In this revolutionary period, there being no contestant, we are compelled to recognize the organization as Virginia. Whether that would be the case, and how the question would be met and disposed of were the insurrections this day abandoned, need not now be discussed.[58]

Were Virginia, or those parts of it not included in the proposed new State invaded and held in temporary subjection by a foreign enemy instead of the insurgents, the fragment of territory and population which should successfully repel the enemy and adhere to the Union would doubtless, during such temporary subjection, be recognized, and properly recognized, as Virginia. When, however, this loyal fragment goes further, and not only declares itself to be Virginia, but proceeds, by its own act to detach itself permanently and forever from the commonwealth, and to erect itself into a new State within the jurisdiction of the State of Virginia, the question arises whether this proceeding is regular, legal, right, and in honest good faith, conformable to, and within the letter and spirit of the Constitution.

I confess that from the brief examination I have been able to give the subject, it is not, to my mind, entirely divested of all constitutional doubt and objection.[59]

If the act submitted for approval be unconstitutional, or if its constitutionality is susceptible of a doubt, it certainly cannot be expedient that it would be consummated. A dismemberment or division of one of the States is **prima facie** inexpedient, and it should not be done except with the clear, full, and explicit consent of the State which is to be served.

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[57] Ibid., No. [illegible]
[58] Ibid., No. [illegible]
[59] Ibid., No. [illegible]

To preserve the States in their integrity is an imperative duty of the government and country. It would be no trivial act to break up, even in the most regular and formal manner, and in time of peace, an ancient commonwealth; and unless the people themselves, in the mode prescribed by the Constitution, deliberately and voluntarily consent to the formation or erection of a new State within the jurisdiction of an old one, Congress should not, by any exercise of questionable authority, attempt to enforce a division or separation. An observance[49] of the rights of the States is conducive [sic] to the union of the States, and a regard for both should prevent such hasty action as will seriously affect either. The Federal government is not authorized to divide or dismember a State; and yet there is no denying the fact that on the approval or rejection of this act, presented to the Executive at this unfortunate time for calm and deliberate action, depends the division or integrity of the State of Virginia. Can it be said to be the wish of the people of Virginia that a new State shall be erected within its jurisdiction, or that they have only signified their consent to it?

Congress may admit new States into the Union; but any attempt to dismember or divide a State by any forced or unauthorized assumption would be an inexpedient exercise of doubtful power to the injury of such State. Were there no question of doubtful constitutionality in the movement, the time selected for the division of the State is most[50] inopportune. It is a period of civil commotion, when unity and concerted action on the part of all loyal citizens and authorities should be directed to a restoration of the Union, and all tendency towards distintegration and demoralization avoided. Cannot the people of the forty-eight counties comprising the proposed new State of Western Virginia do more to effect this restoration, to secure peaceful relations, and to give Virginia her rightful position, by remaining with her, a part of her, one and indivisible, than by separation? If such be the case, it is assumedly inexpedient at this time to divide the old commonwealth and erect Western Virginia, with its proposed objectionable boundaries, into a new State. It would, I fear, if consummated, tend to separation rather than to union, and make more difficult the great object which all loyal people aim to secure.

I do not perceive that injury will be inflicted by postponing for the present the erection of a new State[51] within the limits of Virginia. Those who constitute the present organization and those who would compose the proposed new State are almost identical, so much so, that they can shape the laws and institutions of the community in which they reside. They have their full representation in the national Councils, and their full vote and influence on all national questions. Should this disturbing element of a desire for a division of Virginia remain after the insurrection shall have been suppressed, a peaceful, constitutional, and satisfactory arrangement may then be effected. The consummation of the measure at the present time will, I apprehend, further

[illegible]

complicate and embarrass the Government, and retard its efforts for an effective and speedy adjustment of our national affairs.

Believing as I firmly do in the restoration of the Union and the establishment of the Government on a basis more enduringly satisfactory and correct than ever heretofore, I also[63] anticipate a state of things that will in the progress of events, make north-western Virginia serviceable in promoting the great cause of State and national regeneration. The loyal spirit of West Virginia will, I trust and believe, infuse itself into the disloyal section, and render the whole united people of that great commonwealth, which has unsurpassed natural advantages, as conspicuous in the future as in the past in support of the Union, the Constitution, and the rights of man. It is undoubtedly the true policy of Virginia to preserve its territorial integrity; and the day cannot be distant when, under an improved dispensation, the people beyond the mountains, no less than those of the valley and of the tide-water section, will be converts to that policy, and satisfied that a division would be unwise and inexpedient.

I do not therefore deem it expedient that West Virginia should be erected into a State, nor advise that the bill be approved.

I have the honor to be,
Very respectfully,
Gideon Welles
Secretary of the Navy.

Letter—President Lincoln (Opinions on Constitutionality and Advisability of Admitting West Virginia Into the Union), Washington, D. C., December 31, 1862.

The consent of the Legislature of Virginia is constitutionally necessary to the bill for the Admission of West Virginia becoming a law. A body claiming to be such Legislature has given its consent. We can not well deny that it is such, unless we do so upon the outside knowledge that the body was chosen at elections in which a majority of the qualified voters of Virginia did not participate. But it is a universal practice in the popular elections in all these States to give no legal consideration whatever to those who do not choose to vote, as against the effect of the votes of those who do choose to vote. Hence it is not the qualified voters, but the qualified voters, **who choose to vote,** that constitute the political power of the State. Much less than to non-voters, should any consideration be given to those who did not vote, **in this case:** because it is also a matter of outside knowledge, that they were not merely neglectful of their rights under, and duty to, this government, but were also engaged in open rebellion against it. Doubtless among these non-voters were some Union men whose voices[64] were smothered by the more numerous secessionists; but we know too little of their number to assign them any appreciable value. Can this government

[63] Read, No. [illegible].
[64] MS., L.F., No. [illegible], Abraham Lincoln, Washington, D. C., December 31, 1862.

stand, if it indulges Constitutional constructions by which men in open rebellion against it, are to be accounted, man for man, the equals of those who maintain their loyalty to it? Are they to be accounted even better citizens, and more worthy of consideration, than those who merely neglect to vote? If so, their treason against the Constitution, enhances their constitutional value! Without braving these absurd conclusions, we cannot deny that the body which consents to the admission of West Virginia, is the Legislature of Virginia. I do not think the plural form of the words "Legislatures" and "States" in the phrase of the Constitution "without the consent of the Legislatures of the States concerned" has any reference to the new State concerned. That plural form sprang from the contemplation of two or more old states, contributing to form a new one.[63] The idea that the new State was in danger of being admitted without its own consent, was not provided against, because it was not thought of, as I conceive. It is said, the devil takes care of his own. Much more should a good spirit—the spirit of the Constitution and the Union take care of its own. I think it can not do less, and live.

But is the admission into the Union, of West Virginia, expedient? This, in my general view, is more a question for Congress, than for the Executive. Still I do not evade it. More than on any thing else, it depends on whether the admission or rejection of the new State, would, under all the circumstances tend the more strongly to the restoration of the National authority throughout the Union. That which helps most in this direction is most expedient at this time. Doubtless those in remaining Virginia would return to the Union, so to speak, less reluctantly without the division of the old state than with it; but I think we[64] could not save as much in this quarter by rejecting the new State, as we should lose by it in West Virginia. We can scarcely dispense with the aid of West Virginia in this struggle; much less can we afford to have her against us, in Congress and in the field. Her brave and good men regard her admission into the Union as a matter of life and death. They have been true to the Union under very severe trials. We have so acted as to justify their hopes; and we can not fully retain their confidence, and cooperation, if we seem to break faith with them. In fact they could not do so much for us, if they would.

Again, the admission of the new State turns that much slave soil to free; and thus, is a certain, and irrevocable encroachment upon the cause of the rebellion.

The division of a State is dreaded as a precedent. But a measure made expedient by a war, is no precedent for times of peace. It is said that the admission[65] of West Virginia, is secession, and tolerated only because it is our secession. Well, if we call it by that name, there is still difference enough between Secession against the Constitution, and Secession in favor of the Constitution.

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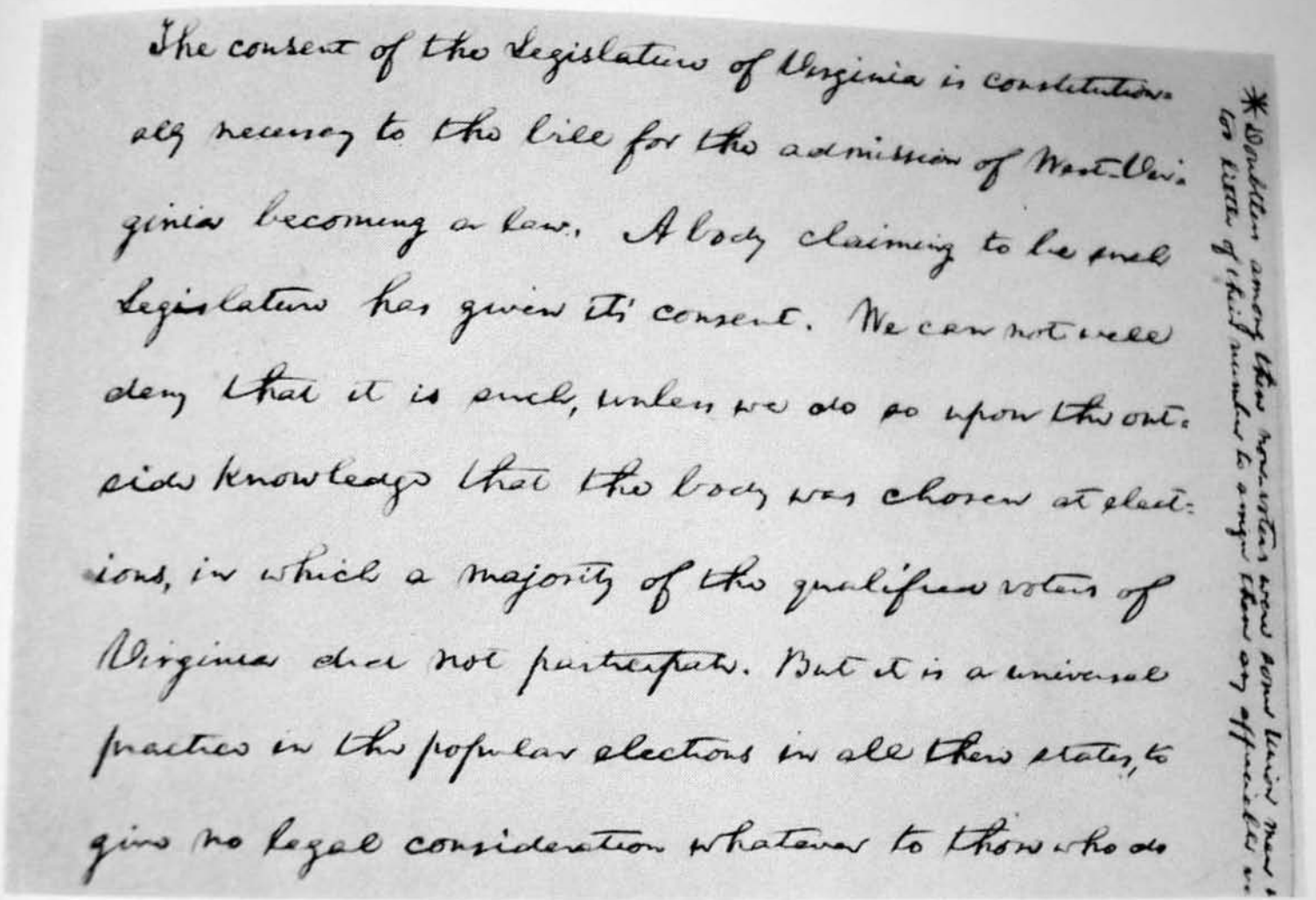
[63] [illegible]
[64] [illegible]
[65] [illegible]



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* Doubtless among these non-voters were some Union men too little of their number to assign them any appreciable vo

A part of the original Lincoln draft on the Constitutionality and Advisability of Admitting West Virginia into the Union.

(Library of Congress)

I believe the admission of West Virginia into the Union is expedient."

The above is a true copy
of the President's Manuscript.

John Hay

March 3, 1863